SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. FED-16-014

KAYLA DOHERTY
Plaintiff-Appellant

v.

MERCK & CO., INC
and
UNITED STATES OF AMERICA
Defendants-Appellees

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF INTERVENOR ATTORNEY GENERAL OF THE STATE OF MAINE

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INTEREST OF INTERVENOR

This case concerns the constitutionality of Maine's Wrongful Birth Statute, ("WBS"), 24 M.R.S. § 2931, which provides that the birth of a healthy child does not constitute a legally recognizable injury and limits damages for a "failed sterilization procedure" to medical expenses for the procedure and pregnancy, pain and suffering connected with the pregnancy, and lost wages due to the pregnancy. Pursuant to 28 U.S.C. § 2403(b), the Maine Attorney General intervened in this action to defend constitutionality of the WBS.

This action was brought by Plaintiff Kayla Doherty ("Doherty") against Defendants Merck & Co., Inc. ("Merck") and the United States in the United States District Court for the District of Maine. Appendix ("App.") 19-37. Doherty's lawsuit is properly characterized as a "wrongful conception" action, in which she seeks damages in connection with the birth of a healthy son after undergoing a medical procedure at a federally supported health center to insert a rod containing an ovulation-inhibiting drug into her arm.[1] The procedure failed, and Doherty gave birth to an unplanned but healthy child in 2014. *Id.* at ¶¶ 1-77.

[1] The terms "wrongful pregnancy," "wrongful conception," "wrongful birth," and wrongful life," are not used consistently in cases and statutes. Most commonly, "wrongful birth" and "wrongful life" actions involve the birth of a child who is born in a severely unhealthy condition. "Wrongful pregnancy" is sometimes used when a physician fails to diagnose pregnancy. *See generally* Don C. Smith Jr., *Cause of Action against Physician for Wrongful Conception or Wrongful Pregnancy*, 3 Causes of Action 83 (March 2016 Update)(explaining terms). At issue in this case is an unplanned pregnancy resulting in the birth of a normal healthy child. For ease

Doherty seeks money damages in connection with the unintended pregnancy and birth of her healthy child, including damages for physical and mental pain and suffering in connection with the birth, medical expenses (prenatal and in connection with the birth), missed time from work, emotional distress from rearing a child as a single mother without adequate planning and economic resources, and the cost of rearing her child. *Id.* at ¶¶ 75-78. Doherty alleges claims for negligence and lack of informed consent against the United States, and alleges claims for product liability, breach of warranty, negligence, and negligent misrepresentation claims against Merck. *Id.* at ¶¶ 79-114. In addition to her claims for money damages, Doherty seeks a declaratory judgment that the WBS is unconstitutional as applied to her claims and on its face. *Id.* at ¶¶ 115-121.

The WBS states, in relevant part:

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.
2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

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of reference, the term "wrongful conception" will be used in connection with the facts presented here.

24 M.R.S. § 2931. In her Amended Complaint, Doherty alleges that to the extent the WBS bars or limits her recovery, it is unconstitutional because it: 1) violates the open courts provision of Maine's Constitution; 2) violates the right to a jury trial under the Maine and United States Constitutions; and 3) violates the substantive due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. *Id.* at ¶¶ 115-121.

Defendants Merck and United States filed Motions to Dismiss, asserting that even if Doherty's factual allegations were true, the WBS bars all of Doherty's claims (including the claims against Merck) because the birth of a healthy child is not a legally cognizable injury under Maine law. In addition, Merck and the United States contended that the implantation of the ovulation-inhibiting drug does not fall within the WBS exception (albeit with limited damages) for a "failed sterilization procedure." App. 18. The Motions to Dismiss were denied, without prejudice, by the United States District Court, pending answers to three questions the District Court certified to this Court pursuant to M.R. App. P. 25:

1. Does the protection of Maine's Wrongful Birth statute, 24 M.R.S.A. § 2931, extend to the defendant Merck & Co., Inc., as a drug manufacturer and distributor?

2. If not, does the Law Court's decision in *Macomber v. Dillman,* 505 A.2d 810 (Me. 1986), which concerned a failed sterilization by a health care provider, apply to the plaintiff Kayla Doherty's claim against Merck as a drug manufacturer and distributor?

3. Does Maine's Wrongful Birth statute prohibit all recovery for Doherty against both defendants (Merck if it is covered by the statute, see question one, *supra*) because of the nature of the procedure she underwent? Or does the statute allow Doherty to proceed with her claims but limit the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy?

App. 12.

With regard to Questions 1 and 2, Doherty argues that neither the WBS nor this Court's holding in *Macomber* applies to drug manufacturers and product distributers such as Merck. Questions 1 and 2 do not draw into question the constitutionality of the WBS, and the Attorney General takes no position on them. With respect to Question 3, Doherty argues that regardless of whether the WBS prohibits all recovery or limits recovery so as to eliminate damages based on the cost of rearing a health child, it is unconstitutional both on its face and as applied to her. The Attorney General disagrees.[2] The WBS implicates neither a suspect class nor a fundamental right, and the rational basis standard of review applies. And, as is discussed below, the WBS is rationally related to several legitimate state interests.

[2] Subsumed within Question 3 is the issue of whether the procedure performed on Doherty was a "sterilization procedure." The Attorney General takes no position on that issue.

STATEMENT OF FACTS

For purposes of answering the certified questions of law, the facts are as stated in Appendix A, attached to the Certificate of Questions of State Law to the Maine Supreme Judicial Court Sitting as the Law Court. Appendix ("App.") App. 10-13.

SUMMARY OF ARGUMENT

When reviewing a challenge to the constitutionality of a Maine statute, the Court presumes that the statute is constitutional and looks for a reasonable interpretation that comports with that presumption. *Doe v. Anderson,* 2015 ME 3, ¶ 11, 108 A.2d 378; *Maine Milk Producers, Inc. v. Commissioner of Agriculture,* 483 A.2d 1213, 1218 (Me. 1984). The burden rests with Doherty to overcome the presumption by proving the statute's unconstitutionality. *Id.* "Any party attacking the constitutionality of a statute thus carries a heavy burden of persuasion." *Maine Milk Producers*, 483 A.2d at 1218. "Before legislation may be declared in violation of the Constitution, that fact must be established at such a degree of certainty as to leave no room for reasonable doubt." *Orono-Veazie Water District v. Penobscot County Water Co.,* 348 A.2d 249, 253 (Me. 1975).

Where, as is the case here, a "statute involves neither a fundamental right nor a suspect class, different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *Sch. Admin. Dist. No. 1 v.*

Comm'r, Dep't of Educ., 659 A.2d 854, 857 (Me. 1995). This Court has held that the right to pursue a tort action and to recover damages is not a fundamental right, and that a constitutional challenge to a state statute limiting tort recovery is subject to rational basis review. *Maine Medical Center v. Cote,* 577 A.2d 1173, 1177 (1990).

The WBS readily passes this test. The WBS essentially codifies this Court's 1986 holding in *Macomber v. Dillman*:

> We hold for reasons of public policy that a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child. Accordingly, we limit the recovery of damages, where applicable, to the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time. Our ruling today is limited to the facts of this case, involving a failed sterilization procedure resulting in the birth of a healthy, normal child.

505 A.2d 810 (Me. 1986). Limiting wrongful birth damages to cases involving failed sterilization and then allowing only certain medical expenses, the pain and suffering connected with the pregnancy, and the loss of earnings by the mother during pregnancy bears a rational relationship to the determination of both this Court and the Legislature that it is against public policy to consider the birth of a normal health child to be an injury for which damages can be awarded. It is also rationally related to the Legislature's goal to reduce malpractice insurance premiums and control the cost of health care. *See Musk v. Nelson,* 647 A.2d 1198,

1202 (Me. 1994). Finally, the WBS is rationally related to several other legitimate state interests: 1) recognizing that the birth of a healthy child is not an injury; 2) prohibiting recovery for overly speculative damages such as child rearing costs; and 3) preventing an adverse impact on a child who learns later that he or she was unwanted. Accordingly, the Attorney General urges this Court to find the WBS constitutional under both the United States and Maine Constitutions.

QUESTIONS PRESENTED

I. DOES THE WBS VIOLATE THE OPEN COURTS PROVISION OF THE MAINE CONSTITUTION?

II. DOES THE WBS VIOLATE THE RIGHT TO JURY TRIAL UNDER THE MAINE AND UNITED STATES CONSTITUTIONS?

III. DOES THE WBS VIOLATE DOHERTY'S RIGHT TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION UNDER THE MAINE AND UNITED STATES CONSTITUTIONS?

ARGUMENT

I. THE OPEN COURTS PROVISION OF MAINE'S CONSTITUTION DOES NOT MANDATE RECOGNITION OF DOHERTY'S WRONGFUL CONCEPTION CLAIM.

Doherty contends that the Maine Constitution's open courts provision requires recognition of her wrongful conception claim. The open courts provision provides:

> Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law, and right and justice shall be

> administered freely and without sale, completely and without denial, promptly and without delay.

Me. Const. art. I, § 19. "The open courts provision means the courts must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy for every wrong recognized by law as remediable in a court." *Maine Medical Center v. Cote,* 577 A. 2d 1173, 1177 (Me. 1990) (emphasis added). The common law or the Legislature determine which claims are remediable in a court, and only those claims which are recognized as remediable in court are protected by the open courts provision. The open courts provision does not create a substantive right to bring whatever claim a person wishes, but instead attaches procedural requirements to claims that have been recognized as legally cognizable either by the common law or the Legislature. Both this Court and the Legislature have determined that with the exception of claims based on failed sterilization procedures, wrongful conception claims are not legally cognizable. Thus, the open courts provision does not apply.

Prior to enactment of the WBS in 1986, in a case of first impression, this Court was presented with the question of whether a parent's claim for damages for the wrongful birth and rearing of a healthy child was legally cognizable in Maine. In *Macomber v. Dillman,* 505 A.2d 810 (Me. 1986), a husband and wife brought an action against a hospital and others for the negligent performance of a tubal

ligation for the purpose of permanent sterilization of the wife, which resulted in the conception and birth of a healthy child. This Court established the general rule that a parent cannot be said to be damaged by the birth and rearing of a healthy child. The Court also established a limited exception to that rule, in the case of a failed sterilization procedure resulting in the birth of a healthy child, which allowed for damages for medical expenses for the sterilization procedure and pregnancy, pain and suffering in connection with the pregnancy, and loss of earnings of the mother during the pregnancy. *Id.* at 813.

Macomber v. Dillman was decided prior to enactment of the WBS but while a bill prohibiting wrongful birth/wrongful life actions was pending in front of the Legislature. *See* L.D. 2065, § 16 (112th Legis. 1986).[3] The initial version of the bill prohibited all claims for damages based upon the birth of a healthy child, without the exception established by the Court in *Macomber v. Dillman*. *Id.* After *Macomber v. Dillman* was decided, the bill was amended to add the exception established by the Court in *Macomber*. *See* L.D. 2400, New Draft of L.D. 2065, § 16 (112th Legis. 1986). The intent of the WBS was to codify the holding of this

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[3] Doherty claims that the initial version of the bill did not include a provision related to wrongful birth actions. Doherty's Br. at 16. This is not the case. L.D. 2065 § 16 (112th Legis. 1986) provided:

> Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth of a healthy child resulted in damages to him.

For the convenience of the Court, copies of the initial and amended bills are included in an Addendum ("Add.) pp. 1-9.

Court in *Macomber v. Dillman,* 505 A.2d 810 (Me. 1986). *See* Legis. Rec. 1466 (1986); Report of the Commission to Examine Problems of Tort Litigation and Liability in Maine (Dec. 1987), p. 173. Add. pp. 10-11.

The Legislature's codification of Maine's common law, as established by this Court, does not violate the open courts provision of Maine's Constitution. Moreover, the Legislature retains the power to determine which types of claims are remediable in court by limiting or even abolishing, common law tort claims and causes of action. *See, e.g., Peters v. Saft,* 597 A.2d 50, 54 (Me. 1991) (limitation on liquor liability); *Beverage v. Cumberland Farms Northern, Inc.,* 502 A.2d 486, 488-489 (Me. 1985) (workers' compensation); *Portland Pipe Line Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 30 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973) (environmental cleanup). *See also Silver v. Silver,* 280 U.S. 117 (1929) (upholding Connecticut statute barring tort recovery for passenger carried gratuitously as a guest in an automobile).[4] Since both this Court and the Legislature have determined that Doherty's claims are not legally cognizable, the open courts provision of the Maine Constitution is inapplicable.

[4] The Legislature has acted to abolish causes of action in other contexts, such as alienation of affection claims (14 M.R.S. § 301), and claims relating to recreational use of land (14 M.R.S. § 159-A).

II. THE WBS DOES NOT VIOLATE THE RIGHT TO A JURY TRIAL UNDER EITHER THE MAINE OR UNITED STATES CONSTITUTIONS.

Doherty's claim that the WBS violates her right to a jury trial under both the Maine and United States Constitutions must be similarly rejected.[5] Whether analyzed under the United States or Maine Constitution, the right to a jury trial is dependent upon there being a cognizable claim and triable issues of fact.[6] In *Peters v. Saft,* this Court rejected the claim that the limitation on liquor liability violated the plaintiff's right to a jury trial:

> In the present context, the right 'to a jury trial means that, with respect to those questions of fact that the substantive law makes material, the party has the right to have a determination made by the jury.' Plaintiff does not have the right to have the jury determine any question he desires.

Id., 597 A.2d at 53-54 (citation omitted). Similarly, the United States Constitution provides a right to jury trial where there is a substantive claim and there are triable issues of fact. *Kelly v. United States,* 789 F.2d 94, 97-98 (1st Cir. 1986). As Doherty notes, this Court, in *Irish v. Gimbel,* 1997 ME 50, ¶ 7, 691 A.2d 664, held that "[a] party has a right to a jury trial in all civil actions unless it is affirmatively shown that jury trials were unavailable in such a case in 1820."

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[5] Article I, § 20 of the Maine Constitution provides for the right to a jury trial in all "civil suits." The Seventh Amendment to the United States constitution provides the right to a jury trial in "suits at common law."

[6] Because this case was brought in federal court under state law, federal law governs the right to jury trial. *Noviello v. Rhode Island,* 142 F.R.D. 581, 583 (D. R. I. 1991).

Doherty contends that she would have had a right to bring her wrongful conception claim before a jury in 1820, and so the removal of the right by the Legislature in 1986 violates her constitutional right to a jury trial. But, Doherty cites no authority for her assertion that the recovery for the tort of wrongful conception for the birth of healthy child existed in 1820. Nor has the Attorney General been able to locate any.

To the contrary, in *Hickman v. Group Health Plan, Inc.*, 396 N.W. 2d 10, 12 (Minn. 1986), the Supreme Court of Minnesota explained that at common law, no cause of action existed for either wrongful birth or wrongful death, citing to *Baker v. Bolton,* 170 Eng.Rep. 1033 (N.P. 1808) and Prosser's treatise on torts – W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts,* §§ 55, 125A (5th ed. (1984). At issue in *Baker* was the constitutionality of a state law barring "wrongful birth" actions. The Court upheld the law using a rational basis analysis, reasoning that since the Minnesota legislature had spoken on the issue, the establishment of a cause of action for wrongful birth or wrongful life was within the exclusive jurisdiction of the legislature. Here, because neither Maine common law nor statutory law recognizes a claim for wrongful conception, the right to jury trial is not violated.

III. THE WBS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OR SUBSTANTIVE DUE PROCESS CLAUSES OF THE MAINE OR UNITED STATES CONSTITUTIONS.

Doherty contends that the WBS violates the substantive due process and equal protection clauses of the Maine and United States Constitutions. Me. Const. art. I, § 6-A; U.S. Const. amend. XIV. The same equal protection standard applies under state and federal law. *Beaulieu v. City of Lewiston,* 440 A.2d 334, 338, n.4 (Me. 1982).

Level of Scrutiny. In considering the constitutionality of the WBS, the first issue is the level of scrutiny that should be applied to the analysis:

> Unless a statute provokes "strict scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.

Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-458 (1988) (citations omitted). The level of scrutiny to be applied to the WBS has been decided by this Court. In *Musk v. Nelson,* 647 A.2d 1198 (Me. 1994), the plaintiff mother challenged on equal protection and due process grounds the Maine Health Security Act's statute of limitations for professional negligence claims. She argued that there was an insufficient basis for distinguishing between malpractice claims involving foreign objects (which could be brought within three years of discovery) from those malpractice claims not involving foreign objects (which had to be

brought within three years regardless of when the negligent act was discovered). Application of the shorter statute of limitations barred the plaintiff's claim. This Court held that the rational basis test applied and was met:

> Limiting the availability of the discovery rule bears a rational relationship to the Legislature's goal to reduce malpractice insurance premiums and control the cost of health care.

Id. at 1202. The Court also rejected the plaintiff's claim that a heightened scrutiny should apply because Musk was a pregnant woman, holding that the statute was gender neutral on its face. The Court should similarly reject Doherty's attempt to apply a heightened level of scrutiny here and uphold the WBS.

Reproductive Rights. Doherty argues that the WBS should be analyzed under a strict scrutiny analysis because it infringes on the fundamental right to privacy with regard to the use of contraceptives, the right to choose whether to carry a pregnancy to term or to have an abortion and the right to individual autonomy. The WBS does not interfere with any of these rights. Whether Doherty can file a lawsuit and recover damages does not directly affect or impose a significant burden on her right to an abortion. *Harris v. McRae,* 448 U.S. 297 (1980) (Hyde Amendment prohibiting use of federal Medicaid money to pay for most medically necessary abortions did not violate federal Equal Protection clause or the right of privacy found in the Due Process clause of the federal constitution); *Maher v. Roe,* 432 U.S. 464 (1977); *Planned Parenthood Ass'n v. Ashcroft,* 462

U.S. 476 (1983). Similarly, Doherty's right to make decisions about contraceptives is unaffected by her ability to file a lawsuit and recover damages. Doherty's reliance on *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Eisenstadt v. Baird,* 405 U.S. 438 (1972) is misplaced. *Griswold* involved a challenge to a state criminal law banning the use of contraceptives. *Eisenstadt* involved a challenge to a state law prohibiting the distribution of contraceptives to single persons. Both cases involved state prohibition of contraception. The WBS contains no prohibition against the use of contraception, making those cases inapplicable.

Courts in other jurisdictions which have considered similar arguments have rejected them. *See, e.g., Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10 (Minn. 1986) (rejecting claim that the Minnesota wrongful birth statute interfered with woman's right to an abortion because limitation of wrongful birth suits does not directly affect or impose a significant burden on a woman's right to an abortion); *Wood v. University of Utah Med. Ctr.,* 67 P.3d 436 (Utah. 2002) (rejecting claims that Utah wrongful birth statute violated woman's right to an abortion, Equal Protection Clause or Open Courts Clause of Utah Constitution); *Dansby v. Thomas Jefferson Univ. Hosp.,* 623 A.2d 816, 819-20 (Pa. Super. Ct. 1993), *appeal denied,* 651 A.2d 538 (1994) (rejecting claim that Pennsylvania wrongful birth statute violated women's right to an abortion and Equal Protection

Clause under United States and Pennsylvania Constitutions, applying rational basis test); *see also Szekeres v. Robinson,* 715 P.2d 1076 (Nev. 1986) (right to abortion under *Roe v. Wade* not implicated by decision to disallow tort actions for the birth of a normal child).[7]

Doherty's claim boils down to her contention that the WBS interferes with her "right" to recover money damages for the unplanned conception and birth of a healthy child. While Doherty may not agree with the policy decision of the Legislature to codify this Court's holding in *Macomber v. Dillon,* the Legislature has settled the issue. The rule adopted by the Maine Legislature follows the majority rule for wrongful conception cases allowing for recovery of the costs, expenses and pain directly attributable to the pregnancy and childbirth but disallowing recovery for the cost of raising a normal child. *See Prosser and Keeton on the Law of Torts*, § 55.[8] This Court and the courts of other states have consistently applied rational basis scrutiny to challenges to wrongful

[7] The case of *Fulton–Dekalb Hosp. Authority v. Graves,* 314 S.E. 2d 653 (Ga. 1984) does not apply a heightened level of scrutiny based upon a fundamental right, as Doherty suggests. Doherty's Br. at 40. In *Fulton-Dekalb Hosp. Authority,* the Court was not reviewing a statutory provision relating to wrongful conception. The court recognized a cause of action, and adopted a measure of damages consistent with this Court's holding in *Macomber v. Dillon* and the WBS.

[8] Some jurisdictions permit the recovery of child-rearing expenses, but require that such damages be reduced by the "benefit" of raising a healthy child. *See* Prosser and Keeton, *The Law of Torts,* § 55; Dan B. Dobbs, *The Law of Torts*, § 293 (2000). Kentucky rejects the wrongful pregnancy action altogether. *Schork v. Humber,* 648 S.W. 2d 861 (Ky. 1983) (holding that the establishment of a cause of action based on wrongful conception, wrongful life or wrongful birth is within the exclusive purview of the legislature). *See* n. 11, *infra.*

birth/wrongful life/wrongful pregnancy/ wrongful conception statutes or court-created rules and have upheld them.

Under rational basis review:

> A State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. The rational-basis standard is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Dallas v. Stanglin, 490 U.S. 19, 26-27 (1989) (quoting *Dandridge v. Williams,* 397 U.S. 471, 485-486 (1970) (internal quotations, ellipses, and brackets omitted). "In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988). "Rather, those challenging the legislative judgment must convince [a court] 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

The WBS follows the majority rule adopted (either by statute or by court decision) allowing limited recovery for a failed permanent sterilization procedure

which results in an unplanned but healthy child.[9] Generally, the recovery is limited to medical expenses related to the sterilization procedures and the pregnancy, lost wages related to the pregnancy, and in some jurisdictions, pain and suffering relating to the pregnancy and birth.[10] Child rearing costs are not allowed in the

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[9] The Attorney General has identified 9 state statutes (in addition to Maine's WBS) relating to wrongful birth/wrongful life/wrongful pregnancy and wrongful conception actions:

Idaho Code Ann. § 5-334(1) (West 2016) ("A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."); Ind. Code Ann. § 34-12-1-1 (West 2016) ("A person may not maintain a cause of action or receive an award of damages on the person's behalf based on the claim that but for the negligent conduct of another, the person would have been aborted."); Mich. Comp. Laws Ann. § 600.2971 (West 2016) ("(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born....(3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission , the child would not or should not have been conceived... (4) The prohibition... applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition."); Minn. Stat. Ann. § 145.424(2) (West 2016) ("No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted."); Mo. Ann. Stat. § 188.130(2) (West 2016) ("No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted."); 42 Pa. Cons. Stat. Ann. § 8305(a) (West 2016) ("There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born."); S.D. Codified Laws § 21-55-1 (West 2016) ("There shall be no cause of action or award of damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to have been born alive."). Cf. Cal. Civ. Code § 43.6(a) (West 2016) ("No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."); N.D. Cent. Code § 32-03-43 (West 2016) ("No person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted.").

[10] *Boone v. Mullendore,* 416 So. 2d 718 (Ala. 1982); *M.A. v. United States*, 951 P.2d 861 (Alaska 1998); *Wilbur v. Kerr,* 628 S.W. 2d 568 (Ark. 1982); *Coleman v. Garrison,* 349 A.2d 8 (Del. 1975); *Garrison v. Medical Center of Delaware Inc.,*571 A.2d 786 (Del. 1989); *Flowers v.*

majority of jurisdictions (including in Maine) for a failed sterilization procedure resulting in a healthy child. [11] The reasons articulated in the court decisions for limiting recovery include: 1) the birth of a healthy child is not an injury, but a source of joy and pride; 2) child rearing costs are speculative; and 3) there is an adverse impact on a child who learns later that he or she was unwanted. *See* Dan B. Dobbs, *The Law of Torts*, (2000), §§ 292-293. Here, the Legislature has made the policy choice to adopt the rule that this Court established in *Macomber v. Dillon,* allowing limited recovery of damages in those cases where a failed permanent sterilization procedure results in an unplanned healthy child. Because

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District of Columbia, 478 A.2d 1073 (D.C. 1984); *Fassoulas v. Ramey,* 450 So. 2d 822 (Fla. 1984); *Fulton-DeKalb Hospital Authority v. Graves,* 314 S.E. 2d 653 (Ga. 1984); *Cockrum v. Baumkgartner,* 447 N.E.2d 385 (Ill. 1983); *Garrison v. Foy,* 486 N.E.2d 5 (Ind. Ct. App. 1986); *Chaffee v. Seslar,* 786 N.E.2d 705 (Ind. 2003); *Nanke v. Napier,* 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Med. Ctr.,* 699 P.2d 459 (Kan. 1985); *Schork v. Huber,* 648 S.W. 2d 861 (Ky. 1983); *Pitre v. Opelousas Gen Hosp.*, 530 So. 2d 1151 (La. 1988); *Rouse v. Wesley*, 494 N.W. 2d 7 (Mich. Ct. App. 1993)(*superseded by statute)*; *Girdley v. Coats*, 825 S.W. 2d 295 (Mo. 1992); *Hitzemann v. Adams,* 518 N.W. 2d 102 (Neb. 1994); *Kingsbury v. Smith,* 442 A.2d 1003 (N.H. 1982); *P. v. Portadin,* 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981); *O'Toole v. Greenberg,* 488 N.Y.S. 2d 143 (N.Y. 1985); *Jackson v. Bumgardner,* 347 S.E. 2d 743 (N.C. 1986); *Johnson v. University Hosps. Of Cleveland,* 540 N.E. 2d 1370 (Ohio 1989); *Morris v. Sanchez,* 746 P.2d 184 (Okla. 1987); *Mason v. Western Pa. Hosp.,* 453 A.2d 974 (Pa. 1982*); Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997*); Smith v. Gore*, 728 S.W. 2d 738 (Tenn. 1987*); Terrell v. Garcia,* 496 S.W. 2d 124 (Tex. Ct. App. 1973); *C.S. v. Nielson,* 767 P.2d 504 (Utah 1988); *Miller v. Johnson,* 343 S.E.2d 301 (Va. 1986); *McKernan v. Aasheim,* 687 P.2d 850 (Wash. 1984); *James v. Caserta,* 332 S.E. 2d 872 (W. Va. 1985); *Beardsley v. Wierdsma,* 650 P.2d 288 (Wyo. 1982).

[11] A minority of jurisdictions allow recovery for child rearing expenses. *See, e.g. Burke v. Rivo,* 551 N.E.2d 1 (Mass. 1990). Some jurisdictions allow for recovery for child rearing expenses, with an offset for the benefits that the parents receive from having a normal healthy child. *See, e.g., University of Ariz. Health Sciences Center v. Superior Court,* 667 P.2d 1294 (Ariz. 1983); *Oochs v. Borrelli,* 445 A.2d 883 (Conn. 1982); *Jones v. Mainowski,* 473 A.2d 429 (Md. 1984); *Sherlock v. Stillwater Clinic,* 260 N.W. 2d 169 (Minn. 1977)(*superseded by statute).*

the WBS is a rational response to legitimate legislative concerns, involving the balancing of delicate societal interests and concerns, it should be upheld.

Doherty argues that there is no rational basis for distinguishing between: 1) women who undergo tubal ligations and women who implant long-acting ovulation inhibiting drugs; 2) women who implant long-acting ovulation inhibiting drugs and men who undergo vasectomies; and 3) consumers who seek damages for a defective long-acting ovulation inhibiting drug and consumers who seek damages for other types of defective products and drugs. Doherty's Br. at 37.[12] Under rational basis scrutiny, the Legislature could rationally distinguish between cases involving temporary contraception and those cases where permanent infertility is sought. Allowing wrongful birth damage recovery in all cases of failed contraception (including condom failure or birth control pill failure) would logically result in many more damage claims which would, in turn, increase health care costs and the cost of malpractice premiums. In addition, there is a logical reason to distinguish between traditional consumer product claims, which do not typically involve difficult ethical, moral and societal issues involving weighing the "benefit" of a healthy child against the cost of child-rearing, and wrongful conception claims, which do raise such issues. Finally, the Legislature's intent to

[12] It is important to note that if the Court finds that the implantation of long-acting ovulation inhibiting drugs is a "sterilization procedure" within the meaning of the WBS, there would be no

codify the holding of this Court in *Macomber v. Dillon* (which allowed for limited recovery only in the case of a failed sterilization) provides an additional rational basis for the WBS.[13]

Disparate Impact. Doherty finally argues that the WBS is unconstitutional on equal protection grounds because it has a disparate impact on women since only women experience pregnancy. Doherty's Br. at 41-44. Doherty relies on *Craig v. Boren,* 429 U.S. 190, 198-199 (1976), in which the Supreme Court struck down an Oklahoma statute that prohibited the sale of beer to males under the age of 21 and to females under the age of 18. *Craig v. Boren* is inapplicable to this case, because, as Doherty acknowledges, the WBS is gender neutral, whereas the Oklahoma statute was not.

Contrary to Doherty's contentions, the WBS provides a limited damages remedy for certain claims for males and forecloses other claims for males, just as it does for females. For example, a male who experienced a failed vasectomy which resulted in the birth of an unplanned healthy child could bring an action to recover for the cost of the failed medical procedure while a male who experienced a condom failure which resulted in the birth of an unplanned healthy child could

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differential treatment between women who receive that procedure and women and men who receive, respectively, tubal ligations and vasectomies.

[13] Doherty has alleged a substantive due process claim, but does not make a due process argument separate from her equal protection claim. To the extent the due process claim is pursued, the WBS satisfies the requirements of due process for the same reasons it satisfies the requirements of equal protection. *Musk v. Nelson,* 647 A.2d 1198, 1202 (Me. 1994).

not. Second, disparate impact analysis is not applicable to constitutional equal protection claims. A showing of intentional discrimination is required in order to make out a constitutional equal protection claim under both the Maine and United States Constitutions. *Aucella v. Town of Winslow,* 583 A.2d 215, 216-217 (Me. 1990); *Washington v. Davis,* 426 U.S. 229, 239-248 (1976). No such showing has been attempted or could be made here. Accordingly, Doherty's claim of disparate impact is without merit.

CONCLUSION

For all of the foregoing reasons, the Attorney General respectfully requests that the Court find the WBS constitutional, both on its face and as applied to Doherty's claims.

DATED: April 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan P. Herman, Deputy Attorney General, hereby certify that I have caused two copies of the State's Brief of Intervenor to be served upon counsel of record by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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Dated at Augusta, Maine this 26h day of April, 2016.

Susan P. Herman

SUSAN P. HERMAN
Deputy Attorney General

SECOND REGULAR SESSION

ONE HUNDRED AND TWELFTH LEGISLATURE

Legislative Document No. 2065

S.P. 820 In Senate, February 24, 1986

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on Legal Affairs suggested and ordered printed.

JOY J. O'BRIEN, Secretary of the Senate

Presented by President Pray of Penobscot.

Cosponsored by Representative Kane of So. Portland, Senator Gill of Cumberland and Representative Hayden of Brunswick.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SIX

AN ACT to Expedite the Resolution of Professional Negligence Claims, to Amend Selective Provisions of the Maine Health Security Act and to Abolish the Discovery Rule in Claims Against Health Practitioners, Health Providers and Attorneys.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 14 MRSA §753 is amended to read:

§753. Two years

Actions for assault and battery, and for false imprisonment, slander, and libel and ~~malpractice of physicians and all others engaged in the healing art~~ shall be commenced within 2 years after the cause of action accrues.

Sec. 2. 14 MRSA §753-A is enacted to read:

expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Defendant to supply list; 60 days. Within 60 days of receipt of the plaintiff's notice of expert witness, the defendant shall serve upon the plaintiff a list of the expert witnesses he intends to call at trial on the issues of liability and proximate causation, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

3. Extension. The time periods may be extended or the names of expert witnesses added to the lists only by motion upon a showing of good cause, including, but not limited to:

A. Unavailability of complete, legible medical records; or

B. Joining of an additional party.

Sec. 16. 24 MRSA c. 21, sub-c. VI and VII, are enacted to read:

SUBCHAPTER VI

PROHIBITION OF CLAIMS BASED UPON WRONGFUL BIRTH AND WRONGFUL LIFE FOR BIRTH OF A HEALTHY CHILD

§2931. Wrongful birth; wrongful life

1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or life of a healthy child.

2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the claim that the birth of a healthy child resulted in damages to him.

3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.

4. Other causes of action. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual.

SUBCHAPTER VII

STRUCTURED AWARDS

§2951. Provision for structured awards

1. Definition. As used in this subchapter, the term "health care services" means acts of diagnosis, treatment, medical evaluation or advice or such other acts as may be permissible under the health care licensing, certification or registration laws of this State.

2. Structured awards; periodic payments. In any action for professional negligence, the court in which the action is brought shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds $250,000 in future damages exclusive of litigation expenses, including, but not limited to, expert witness fees, attorneys' fees and court costs.

A. In the case of a jury trial, prior to the case being presented to the jury, the judge shall make a preliminary determination as to whether or not a verdict is likely to result in an award for future damages in excess of the threshold set out in this subsection. If such a determination is made, the judge shall instruct the jury to appor-

inition of health care practitioner. The effect of this change is to broaden the application of the new provisions of the Act to all health care practitioners, and not just physicians as in the existing law.

The bill amends the Maine Health Security Act by requiring a plaintiff in a medical liability suit to file a list of expert witnesses and the substance of their testimony within 90 days from filing suit. The result will be a more expeditious handling of claims and less filing of frivolous suits. The defendant would have to file the defendant's expert witness information within 60 days of receiving the plaintiffs.

The bill amends the existing statutes of limitations by:

1. Eliminating the so-called "discovery rule" in all cases except "foreign object" surgical cases;

2. Reducing the long 20-year tail on minor's claims to 6 years; and

3. Extending the present 2-year statute for other than minors to 3 years.

The bill makes the "discovery rule" which is abolished in actions against attorneys.

The bill eliminates as causes of action for claims suits alleging "wrongful life" and "wrongful birth" where the result of the birth is a healthy child. The courts in several states have prohibited the recovery for a claim based on the birth of a healthy child believing that it would be against public policy to claim that the birth of a normal healthy child is an "injury" to the parents, "wrongful birth" suits.

Similarly, in a "wrongful life" action, the child himself claims that, but for the negligence of the physician, he would not have been born. While acknowledging that a child born with handicaps, genetic defects or other illness should be able to sue for any damages associated with the defect caused by a physician's negligence, the proposed statute eliminates the child's ability to claim damages just for

(New Draft of S.P. 820, L.D. 2065)
(New Title)
SECOND REGULAR SESSION

ONE HUNDRED AND TWELFTH LEGISLATURE

Legislative Document No. 2400

S.P. 958 In Senate, April 13, 1986

Reported by the Majority Report from the Committee on Judiciary and printed under Joint Rule 2. Original bill sponsored by President Pray of Penobscot. Cosponsored by Representative Kane of So. Portland, Senator Gill of Cumberland and Representative Hayden of Brunswick.

JOY J. O'BRIEN, Secretary of the Senate

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SIX

AN ACT Relating to Medical and Legal Professional Liability.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 14 MRSA §753 is amended to read:

§753. Two years

Actions for assault and battery, and for false imprisonment, slander, and libel ~~and malpractice of physicians and all others engaged in the healing art~~ shall be commenced within 2 years after the cause of action accrues.

Sec. 2. 14 MRSA §753-A is enacted to read:

§753-A. Actions against attorneys

2. Defendant to supply list; 60 days. Within 60 days of receipt of the plaintiff's notice of expert witnesses, the defendant shall serve upon the plaintiff a list of the expert witnesses he intends to call at trial on the issues of liability and proximate causation, the subject matter on which each expert is expected to testify, the substance of the facts and opinions to which each expert is expected to testify and a summary of the grounds for each opinion.

3. Extension. The court may extend the time periods established in this section or permit the addition of names of expert witnesses to the list after the time periods established in this section have expired only by motion upon a showing of good cause. Good cause includes:

A. Unavailability of complete, legible medical records;

B. Joining of an additional party; or

C. Any other cause the court determines to require extension or addition under this subsection in the interest of justice.

Sec. 16. 24 MRSA c. 21, sub-c. VI and VII, are enacted to read:

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PROHIBITION OF CLAIMS BASED UPON WRONGFUL BIRTH AND WRONGFUL LIFE FOR BIRTH OF A HEALTHY CHILD

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2. Birth of healthy child; claim for damages prohibited. No person may maintain a claim for relief or receive an award for damages based on the

claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

3. Birth of unhealthy child; damages limited. Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child.

4. Other causes of action. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual.

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1. Definition. As used in this subchapter, the term "health care services" means acts of diagnosis, treatment, medical evaluation or advice or such other acts as may be permissible under the health care licensing, certification or registration laws of this State.

2. Structured awards; periodic payments. In any action for professional negligence, the court in which the action is brought shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds $250,000 in future damages exclusive of litigation expenses, including,

The new draft eliminates claims for damages based on the birth and rearing of a healthy child, but permits damages for medical expenses, pain and suffering and lost earnings where a failed sterilization results in the birth of a healty child.

While acknowledging that a child born with handicaps, genetic defects or other illness should be able to sue for any damages associated with the defect caused by a physician's negligence, the new draft eliminates the child's ability to claim damages just for being alive which would require the judge or jury to determine the difference in value between nonlife and life with defects.

The new draft requires that any award for future damages in a medical malpractice action equaling or exceeding $250,000 be paid in periodic payments upon the request of either party. The court would make a specific finding as to the dollar amount of periodic payments which would compensate the creditor for future damages and any creditor not adequately insured would be required to post adequate security. In the event of the death of the judgment creditor, amounts of the award still owed for future medical expenses, care or custody would be paid to the judgment creditor's estate.

This new draft amends the provisions of the Maine Health Security Act dealing with malpractice screening panels by:

1. Making the use of the panels mandatory;

2. Including in panels one attorney member, one or 2 health care practitioner or provider members and one present or former member of the judiciary as panel chairman; and

3. Increasing the incentive not to proceed to trial after screening, thus encouraging defendants to settle in cases where negligence and causation is found and by encouraging plaintiffs not to proceed where the panel makes a finding against negligence and causation.

MAINE STATE LEGISLATURE
Augusta, Maine 04333

Report of

THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE

DECEMBER 1987

Richard L. Trafton, Chair

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MEDICAL MUTUAL INSURANCE COMPANY OF MAINE

Physicians and Surgeons
Professional Liability

Notice of expert witnesses:

The new law provides the counsel for that defendant doctor has only 60 days after receipt of the plantiff's expert's medical theories of the case to marshall evidence in opposition to them. As a practical proprosition, under normal pre-trial discovery, the defense has a much longer period than 60 days within which to elicit the plaintiff's expert's theories and take appropriate depositions and interrogatories prior to trial. In essence, this section simply restricts the defendant's response time to 60 days whereas in actual practice it is generally much longer. The Company's experience is that it is physically impossible to fully analyze the plaintiff's medical theory, consult with the insured physician, search the medical literature, locate out of state specialists willing to testify, submit all relevent information to them, meet with them to determine whether their testimony should be presented, and provide a summary of their opinions within 60 days. It is our opinion that this provision may in fact hamper the presentation of a full defense and evaluation of the case and will probably result in increased indemnity payments to plaintiffs.

Prohibition of claims based upon wrongful birth of a healthy child:

This section does nothing more than recognize the existing case law in both Maine and the majority of American jurisdictions. While it is true that the damages are limited to special expenses and pain and suffering connected with pregnancy and the sterilization procedure; this has previously been the prevailing holding of the courts of Maine. See Macomber V. Dillman, 505 A.2d 810 (Me. 1986). Therefore the codification of this holding will have no impact upon the Company's rates.

Structured awards:

This provision of the law does not elminate or reduce the amount of indemnity payments which must be made by the insurance company as a result of a jury verdict or settlement with payments to be made in the future which recognize the present value of money and the interest to be added on account of the delay in payments. While this statute may have salutory effects upon the welfare costs of the State